

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action
	)	No. 18-10399-DPW
v.	)	
	)	
BRIAN WALSH,	)	
	)	
Defendant.	)	
	)	

BEFORE THE HONORABLE DOUGLAS P. WOODLOCK  
UNITED STATES DISTRICT JUDGE

SENTENCING

October 8, 2021  
11:05 a.m.

John J. Moakley United States Courthouse  
Courtroom No. 1  
One Courthouse Way  
Boston, Massachusetts 02210

Kelly Mortellite, RMR, CRR  
Official Court Reporter  
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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Douglas P. Woodlock, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Courtroom 10, Boston, Massachusetts, on October 8, 2021.)

(Case called to order.)

THE COURT: Counsel, thank you for the materials that you filed yesterday. They were helpful in focusing my attention on this. I'll get to the bottom line first, which is that I am going to impose a sentence of time served with extensive conditions here. It appears to be the appropriate way to deal with this.

I understand that there are people in the courtroom who feel that they should express themselves by nonverbal means because there's no jury here. I'm familiar with that, but if that ever happens in a trial, I want the representatives of the government to be aware that they will be excluded from the courtroom. Understood?

So let's turn to the larger question in this case, which are the conditions. The reason that I am making this judgment is that it seems to me that the conditions that have been proposed here are sufficient to deal with the larger question of concern about whether or not the defendant will

1 live up to what he says he's going to do. If he doesn't, then  
2 there will be supervised release violations to deal with.  
3 Nevertheless, I'm satisfied on the basis of the record here  
4 that there is a variety of mechanisms by which there can be  
5 verification of what appears to be the request for trust that  
6 has been offered by the defendant in this case.

7 I want to pause for a moment to deal with the status  
8 report of the United States, which frankly satisfies all that  
9 I've asked for here. I will continue to require status reports  
11:06 10 through the period of supervised release. That's the extended  
11 period over which I think I have responsibility to continue to  
12 pursue the objects that were the source of the concern in this  
13 case. That seems to me to be part of a larger responsibility  
14 that I have and that the government has undertaken and been  
15 executing to ensure that there is restitution in the form of no  
16 ill-gotten gains remaining with the defendant and efforts to  
17 return to those persons who received the objects, or have  
18 received the objects, will ultimately be forced to return them.  
19 In any event, whatever can be done during the period of  
11:07 20 supervision will be done. The period of supervision will be  
21 three years.

22 Now, let me turn to, because I started at the bottom  
23 line, with the conditions. First, this is for the first year  
24 to be subject to home confinement. There is location  
25 monitoring that will be provided according to technology at the

1 discretion of the probation office. The defendant is going to  
2 be required to be restricted to his residence at all times,  
3 except for employment, education, religious services, medical  
4 treatment, including medical treatment that he is facilitating  
5 for his mother. But it's home confinement with location  
6 monitoring. That means that the defendant for that first year  
7 is going to have a bracelet on, and he'll be responsible for  
8 the costs of that.

9 I want to turn then to the more specific proposed  
10 conditions that the parties themselves have provided. First,  
11 that the defendant must work at gainful employment at least 35  
12 hours per week. That's going to be done from home. This is  
13 not the defendant going out into the community. The defendant  
14 has the capacity to do that from home, and he'll be expected to  
15 do it from home.

16 Second, because I think I can treat only the  
17 defendant's income and rather than imposing a further  
18 obligation to scrutinize the financial circumstances of the  
19 larger family involved who, it's clear to me, are providing  
11:10 20 funds to the defendant for various purposes here.

21 Nevertheless, 100 percent of all of his income that he earns  
22 during this period must be applied toward the restitution and  
23 restitution obligation until the restitution obligation is  
24 fully satisfied. The payments are to be made quarterly, and  
25 the defendant must provide proof of his income quarterly to the

1 probation office.

2 The defendant will have an obligation to perform 500  
3 hours of community service per year for organizations that are  
4 approved by the probation office.

5 Now, my intention remains that the defendant be  
6 subject to home confinement for the first year, and the  
7 probation office may have to exercise a bit of imagination to  
8 find those programs for that first year that are necessary, but  
9 I'll look to the probation office to make recommendations to  
10 me. The defendant must continue to participate in programs for  
11 the Boston Breakthrough Academy. That seems to have been a  
12 source of apparent transformation of the defendant.

13 We'll talk and I've talked during the course of our  
14 discussions earlier that the defendant here is privileged in  
15 various ways to be able to participate in that. Nevertheless,  
16 the role that it appears to have played in his life should not  
17 be diminished, even if it's not otherwise available to other  
18 people in the community for economic and demographic reasons.

19 The defendant must see a therapist at least two times  
11:12 20 a month and provide a release to the probation office for  
21 access to all of his records from the therapist. Those are  
22 matters that would otherwise be subject to a form of privilege  
23 perhaps. I don't mean, because these are proposed programs, I  
24 don't mean in any way to interfere with evidentiary privileges,  
25 but they're offered as a means of evidencing the defendant's

1 remorse and willingness to make things right. But probation  
2 should have an opportunity to review what the therapist is  
3 saying.

4 My assumption, but I'm not making it a direction, is  
5 that the therapist will be Dr. Tittman here who has had a  
6 lengthy experience with the defendant over a course of time.  
7 And of course I've, as I've indicated, relied on the  
8 forward-looking aspects of his report.

9 The defendant is going to have to participate in a  
11:13 10 restorative justice program that's approved by the probation  
11 office. This is something that is critical in a variety of  
12 different settings in which the probation office has really  
13 been a leader in this nation in helping to make clear to  
14 defendants like the defendant here the harm that he's done.  
15 And that's something that is problematic in light of the  
16 psychological information that I've received here and the  
17 psychological profile that has been presented.

18 So restorative justice is a way of dealing with that,  
19 and probation is capable, I know, because they have a variety  
11:14 20 of different programs that have been speaking to people from an  
21 entirely different demographic to address this issue. But it's  
22 not just for you. It's for others who participate in this to  
23 understand precisely what it is that you've done wrong, what  
24 you profess to now want to make right and permit them to  
25 participate.

1           We have three victims directly here. They're not, as  
2   near as I can figure out, close by here, but they can  
3   participate in various ways on that, and it's important for  
4   them to do so.

5           Restorative justice is a principle really at the core  
6   of I think modern understanding of the value of supervision.  
7   The defendant may travel outside of the state of Massachusetts,  
8   Commonwealth of Massachusetts, but that travel is limited to  
9   such business purposes as may be pre-approved by the probation  
11:15 10   office. I don't imagine there will be any travel in the first  
11   year. And for the second two years, it's really going to be a  
12   matter for probation to evaluate. This is back to this  
13   question of making sure that the defendant is responsible in  
14   this way.

15           Now, the defendant has additional obligations under  
16   the plea agreement here, and those will be embodied in the  
17   judgment in this case. I'm not sure that the parties haven't  
18   called it out already here, but let me deal with these and ask  
19   whether or not any of these need specific inclusion in the  
11:16 20   supervised release conditions.

21           The defendant has agreed to entry of an order  
22   requiring payment of restitution of \$50,000 to Victim 1, an  
23   order requiring payment of restitution of \$145,000 to Victim 3,  
24   and an order requiring payment of the value of the three  
25   paintings described in paragraph 4C to Victim 2.



1           My understanding, and you'll correct me if I'm wrong,  
2           is that all of that is embodied now in the proposed restitution  
3           orders that we have.

4           MR. MORAN: The points I was actually considering,  
5           Your Honor, is that Mr. Walshe agreed to, on page 5, section 5,  
6           which governs forfeiture, it's actually pages 4 through 7,  
7           Mr. Walshe agrees to undertake certain steps to assist the  
8           government in its efforts.

9           THE COURT: Those I will get to as well shortly. What  
11:17 10          I want to do is go through the agreements on page 3 of the plea  
11          agreement to make sure that we've covered all of those, and  
12          then we'll go on to additional ones.

13          MR. MORAN: As a housekeeping matter, I wanted to be  
14          heard on one of the other conditions, if I have an opportunity.

15          THE COURT: One that I've talked about already?

16          MR. MORAN: Yes.

17          THE COURT: Okay. Why don't you go ahead.

18          MR. MORAN: As to the restorative justice program,  
19          Your Honor, I'm a big believer in those programs, and I have  
11:18 20          also followed probation's progress with those. Ms. Miner  
21          actually suggested that, at my suggestion, we remove that  
22          condition.

23          My understanding, what they've done so far has been  
24          largely with drug cases which does not have an enumerated  
25          victim, and they've had a member of the community stand in for

1 the victim. And I've attended some of the sessions, as I know  
2 Your Honor has. I've seen the presentations and I do think  
3 it's a good program. But my understanding is that probation is  
4 just now gearing up to do restorative justice where you've got  
5 a direct and actual victim. And I commend their efforts. I  
6 think that's far more complicated because, as I understand the  
7 process, the victim has to be central. So I would ask Your  
8 Honor, it's really -- if the victim doesn't want to  
9 participate, then -- the victim deserves some autonomy and some  
11:19 10 role in the process. And if the victim doesn't want to  
11 participate, the victim shouldn't have to. I would ask that it  
12 be at the direction of probation with consent of participation  
13 of the victims. I think they have a role in this and we  
14 shouldn't forget about that, and I'm not sure it makes sense if  
15 they're not participating.

16 THE COURT: I understand the concern, and let me  
17 respond in two ways. I think that it's dealt with right now by  
18 the way in which it's formulated. But I'll step back a bit.  
19 It is the case that the probation office is attempting to  
11:19 20 rethink -- not rethink -- to expand this. This may be one of  
21 those cases that permits that expansion.

22 Why would I permit the expansion? Well, because as  
23 you say, the question of restorative justice so far has been  
24 directed to people with essentially drug cases but firearms  
25 cases too, and those are ones in which the victims are somewhat

1 diffuse or even unidentifiable as such, although not entirely.

2 The people who participate in restorative justice are  
3 not merely the victim and whoever the victim is and the  
4 defendant but also facilitators. The way in which they've  
5 worked best has been cases in which, and this is a common  
6 theme, I'll use the exemplar, I think you're familiar with it,  
7 of at least one of the facilitators being the mother of a son  
8 with a drug problem who was murdered, not by the people who  
9 were involved in the restorative justice program but murdered,  
10 and making clear to a defendant there are collateral  
11 consequences out here that you have been less than attentive.

12 Now, the particular victims involved here should not  
13 be forced to participate and they're not. I've had several  
14 recent cases trying to apply restorative justice which has its  
15 origins in trying to bring people to readiness to function in  
16 the community in the context of people with privilege, like the  
17 defendant here, or a person who engaged in a kidnapping and the  
18 victim didn't want to be involved in it, but there was an  
19 interaction by letter between the victim and the defendant that  
20 seemed to be useful as a way of furthering the understanding of  
21 the defendant and suturing together the tear in the social  
22 fabric that is created by the defendant's crime.

23 In any event, this appears to me to be a good case to  
24 permit that kind of expansion, but to deal with the specific  
25 question you've asked is do the victims have to participate?

1 No, they don't. That's really up to them. They've made clear  
2 what their concerns are here, but probation I'm sure will  
3 afford them additional opportunities if they wish to without  
4 intruding on their autonomy to say we really don't want to be  
5 part of this process. But it works best when everybody is  
6 involved in it. And the "everybody" are not just the victims  
7 and the defendant but the facilitators who have a significant  
8 role in shaping everybody's understanding of what is involved  
9 when a crime is committed, even a crime that is nonviolent or  
10 doesn't involve the kind of instinct for violence that drugs  
11 and firearms generally, even without victims, provide. So I  
12 understand your point about it, and I'll refine this to the  
13 degree that's necessary if there are additional points that you  
14 want to make with respect to it.

15 But back to the questions or the issues on page 3, I  
16 think that the restitution orders that we're dealing with now  
17 are sufficient to deal with that, but maybe I have to do  
18 something more with respect to the three paintings described in  
19 paragraph 4E here. I don't think I do, but there is reference  
20 to the one Dollar Sign by Andy Warhol. Of course this was  
21 drafted at a time when there was perhaps some anticipation that  
22 the defendant was going to be able to make a recovery. He  
23 didn't here. But I would think that dollar figures for  
24 restitution cover that now.

25 MR. MORAN: Yes, Your Honor.

1 THE COURT: Okay. So then we have, I think we've  
2 dealt with that issue of restitution, and I will say with  
3 respect to restitution and forfeiture here, both of which I'm  
4 going to enter, that there will be an order of priority. An  
5 example of a case in which I've dealt with it recently, Ms.  
6 Head is probably familiar with it as well as you are I'm sure,  
7 is in *Correia*, which I provided a hierarchy of payments that  
8 will in this case -- let me pull up my notes more specifically  
9 concerning it.

11:26 10 Well, essentially it is, first order of responsibility  
11 is the assessment then the principal of restitution and then  
12 the interest on restitution. Interest is running on  
13 restitution as of the entry of this matter. And the final  
14 thing would be forfeiture. That leaves perhaps unaddressed the  
15 question of -- or at least unaddressed for the moment the  
16 question of whether or not there would be duplicative recovery  
17 for forfeiture and restitution, but it's my intention to do it  
18 that way.

19 The defendant also has, and I'll leave this open for  
11:27 20 further discussion after I announce it, the obligation to  
21 cooperate to the full degree necessary, including the waiver of  
22 any attorney-client or work product privilege to make whole the  
23 persons who are subject to restitution. The language that's  
24 used in the parties' submission is any subsequently identified  
25 buyers of the Shadow paintings. I don't think it's limited to

1 the Shadow paintings. It includes those persons who have been  
2 identified here in the restitution itself. And that includes  
3 that he makes himself available for deposition, and the earlier  
4 discussions have been within a month. If that works for the  
5 government's investigative purposes, that's the time period.  
6 That's up to the parties, but the intention is that this be  
7 done promptly to facilitate the government's investigation of  
8 this matter with a view toward providing actual restitution in  
9 this case as outlined in the government's status report.

11:29 10 Now, there are the standard conditions that the  
11 defendant will have to sign on the judgment instrument, and  
12 there are mandatory conditions as well. Principal among them  
13 is that the defendant not commit another federal, state or  
14 local crime. If he does, I want to be as clear as possible  
15 that this is going to be a matter that will be fully  
16 reconsidered.

17 There is three years to demonstrate yourself,  
18 Mr. Walshe. There are a number of people who are not so  
19 certain about this. I'm taking the step that we'll see on it.  
11:30 20 But I don't want you to be misunderstanding in any way that if  
21 you come back to me with a violation of these conditions that  
22 you're going to be facing real jail time, so it's up to you.

23 Now, are there other reasons that the parties would  
24 ask me to announce at this point? What I'm going to do,  
25 together with Ms. Beatty, we'll get this completed over the

1 weekend and provide a draft copy so that everybody understands  
2 what is involved. Mr. Moran?

3 MR. MORAN: Your Honor didn't mention the special  
4 conditions set forth at page 32 of the PSR. You mentioned  
5 mandatory and standard. There are some special conditions  
6 regarding new credit, financial information.

7 THE COURT: Yes.

8 MR. MORAN: Mental health. It's page 32, Your Honor.  
9 I think the parties agree on them.

11:31 10 THE COURT: And you're right to call it out, but in  
11 point of fact, the draft I've been working with here, as I've  
12 worked my way through, does precisely that. So let me just  
13 refer to it for you.

14 That, as I've indicated, the defendant pay the balance  
15 of the restitution according to a court ordered repayment  
16 schedule if it hasn't been paid promptly. And he's prohibited  
17 from incurring any new credit charges or opening additional  
18 lines of credit without the approval of the probation office  
19 while any financial obligations are outstanding.

11:32 20 He's obligated to provide the probation office with  
21 access to any requested financial information, and that may be  
22 shared with the financial litigation unit of the United States  
23 Attorney's Office. I believe those are the more specific ones  
24 that touch on this issue here.

25 MR. MORAN: Yes, Your Honor.

1 THE COURT: There is an additional matter, and that is  
2 that there is a dismissal of a count by the government, and I  
3 would expect to receive a form dismissal. As I've explained to  
4 some of your colleagues, some have had experience with it as  
5 well, the government frequently files these as motions for  
6 leave to dismiss. I have some questions about, as a separation  
7 of powers matter, whether or not my leave is necessary, but  
8 I'll sign it. I want it tied up, and there's been some perhaps  
9 backsliding more recently in the office here about making sure  
11:33 10 that dismissals are completed.

11 MR. MORAN: I do request dismissal, and I will file  
12 the necessary paperwork today.

13 THE COURT: Right. It has a -- if you wonder what my  
14 endorsement is going to look like, it has a standard  
15 endorsement referring to a case in which I questioned my  
16 authority.

17 MR. MORAN: I'm familiar with the Henderson case.  
18 With Your Honor's permission, I'm just going to use the  
19 standard office form.

11:33 20 THE COURT: That's fine with me. I think my views are  
21 not necessarily shared by everybody else, but I want to make  
22 sure that this is included here so that we've tied the entire  
23 matter up in that regard.

24 U.S. PROBATION: Your Honor, if I may, Steven Killelea  
25 from probation --



1 COURT REPORTER: I'm sorry.

2 THE COURT: If you could remove your mask.

3 U.S. PROBATION: With respect to the home confinement  
4 condition, I'm just seeking clarification. You had made  
5 reference to location monitoring or some level of home  
6 confinement being enforced through the wearing of a bracelet.  
7 There is one technology that would be absent a bracelet, so I  
8 just wanted to have --

9 THE COURT: I think it's fair to say that as a general  
10 matter I would leave the question to the discretion of the  
11 probation office. That's my general view. This is a different  
12 case. The defendant should be wearing a monitor here.

13 U.S. PROBATION: Understood, thank you.

14 THE COURT: I want every day the defendant to  
15 understand that he is subject to location monitoring by an  
16 object.

17 U.S. PROBATION: Understood, Your Honor, thank you.

18 THE COURT: Okay. So you know, Mr. Walshe, this has  
19 been a case about objects, the significance of objects and the  
11:35 20 symbolic significance, I hope the symbolic significance of  
21 objects but not entirely. There is a tangible dimension of  
22 this. Any tampering with that is a reason for there to be a  
23 violation report, and I'll take it very seriously. But I want  
24 you to be reminded every day that there has been a crime  
25 committed, several committed, and that's why you have that

1 location monitoring on you.

2 The probation office has a variety of different forms  
3 that they try to deal with, a variety of different vendors, but  
4 I'm making a very explicit finding with respect to that as a  
5 result of the inquiry that's been made here. Okay?

6 Any other matters that should be covered now? As I've  
7 indicated I will provide, through Ms. Beatty, a copy of the  
8 draft form so that before I enter it in final form the parties  
9 have an opportunity to refine anything that I've said on it,  
11:36 10 but this is the oral version of the sentence to be imposed in  
11 this case. Of course the sentence can't depart materially from  
12 the oral version of it.

13 So let me explain here why I've done what I've done.  
14 This is not precisely what was anticipated in the plea  
15 agreement, but the basic bones of it are in the plea agreement  
16 itself, that is the terms and conditions of supervised release.  
17 It's certainly not the position that the government has taken  
18 with respect to it, which is a guidelines sentence. I  
19 mentioned before in our earlier discussion this week something  
11:37 20 that I say every time there's a sentence imposed.

21 The sentence involves two dimensions and a liminal  
22 moment now when we're passing from history to future. And in  
23 that liminal moment, we don't know, or at least I don't know  
24 exactly how this is going to proceed, but I make judgements  
25 about it. And the judgments are shaped by Section 3553, which

1 tells me the factors that I should consider, and I'll outline  
2 them here, although we've talked about them in our extensive  
3 discussion.

4           They pull in different directions. There are some  
5 that say a sentence of a particular amount, and the guideline  
6 here seems to me to be not wholly out of line. The problem  
7 with the guidelines in my experience is they're not  
8 sufficiently nuanced, but this collection of guidelines seems  
9 to me to be pretty close to what you would say, all other  
11:38 10 things being equal, this would be what a sentence would be for  
11 committing these crimes, and it's understandable the government  
12 would take that position and I respect that.

13           But all other things are not always equal, and that's  
14 what requires judgment in the case, irrespective of whether  
15 representatives of the government think that part of their role  
16 is to shake their head in the courtroom when there is  
17 announced, I mean nonlegal representatives of the government  
18 who should know better and perhaps will observe this in the  
19 future.

11:39 20           The first one is the seriousness of the crime. It's  
21 sometimes said, oh, well, you know, we've got people who are  
22 trying to get a better deal. They're complicit in some  
23 fashion, the victims are complicit in some fashion in the  
24 fraud. That's not this case. The defendant offered something  
25 knowing that he couldn't deliver it and wouldn't deliver it.

1 Part of it was dealing with Victim 1, someone with whom he had  
2 no previous experience. It was just a transaction that he  
3 couldn't make good on when he was called on it. But that's a  
4 crime. He's incurred costs and intangibles of the type that  
5 Mr. Moran talked about.

6 More serious to me is doing it to a friend and  
7 recording it in a way that illustrated the lack of any sense of  
8 responsibility for what was being done. Perhaps the cruelest  
9 kind of experience would have been for that friend to -- and  
10 was I suspect -- to read the journal notes that the defendant  
11 provided.

12 So this is a crime not merely of fraud or financial  
13 misdoings but a crime in which the defendant's intent is as  
14 clear as could be, and it is the most malevolent intent  
15 imaginable. What does that mean? Ordinarily that would pull  
16 in favor of prison time. I then deal with the nature and  
17 characteristics of the defendant. To some degree I talked  
18 about it already in the discussion about Dr. Tittman's report  
19 and the ambiguity or at least the missing link in Dr. Tittman's  
20 report between someone with significant psychological issues  
21 that he has to address and the request that he not spend time  
22 in prison because of other obligations that he's working  
23 through.

24 I start with the aspects of the defendant's past life  
25 that, but for the transformation, would tell me that the

1 defendant ought to spend time in jail. But there is a  
2 transformation. I don't want to make it sound like someone  
3 being struck blind on the road to Damascus, but there is a  
4 transformation here, and it could be dated more or less I think  
5 with the defendant's marriage and through the office of his  
6 wife or her experience drawing himself into the breakthrough  
7 process, and it seems to me to be real and ongoing and worthy  
8 of support. And that pulls in a different direction. It  
9 doesn't necessarily pull toward prison, assuming that it's a  
11:43 10 real breakthrough, which is the point that I've been trying to  
11 make here, that it better be demonstrated and continue to be  
12 demonstrated as a responsibility.

13 I am particularly affected, obviously, by the letters  
14 that I've received, although they do have a certain formulaic  
15 quality, but that may be part of the process of people adhering  
16 to a template trying to work it out. More striking to me is  
17 the defendant's mother's letter in light of the history here.  
18 But it is the case for a variety of different reasons that the  
19 defendant is the support for his mother who has extraordinary  
11:44 20 challenges, and he seems to have risen to the occasion in  
21 dealing with it under circumstances in which I think it's  
22 possible that someone would say, you know, my past experience  
23 tells me that I should not rise to the occasion since there  
24 were past experiences in which people didn't rise to the  
25 occasion for me. I think it's real. I mean to permit the

1 defendant to continue to provide that support for his mother  
2 here. And I recognize the candor that his mother illustrated  
3 in her letter, which was not formulaic in any manner.

4 So I'm faced with a person, forward-looking, capable  
5 of doing things that are very important to himself, to his  
6 family, to the community. That's ambiguity about putting  
7 somebody into prison. But there's another dimension that is  
8 particularly important to me. I mentioned it as well, and that  
9 is the relationship with the children. We've talked about it,  
10 tried to talk about it candidly, and I think everyone has been  
11 candid in the assessment of this, both the government and the  
12 defense counsel. But this much is clear. The defendant had a  
13 troubled childhood in which the relationship with his father  
14 was I think one that substantially adversely affected his  
15 psychological makeup.

16 I'm not pretending to be a psychiatrist or  
17 psychologist, but I am relying on things like Dr. Tittman's  
18 report in assessing this. And it seems clear that the  
19 defendant is making amends through his children. Not through  
20 his children but, you know, to do what wasn't done for him.  
21 And I don't mean to interfere with that, unless the defendant  
22 by his failure to comply with the conditions of supervised  
23 release forces me to do that.

24 And I want you to be clear, I keep saying it. I don't  
25 want to sound like a skoal but I am, if something happens that

1 involves a violation of conditions, you've made the decision  
2 yourself. You can say, one could say that you've already made  
3 the decision, but there is a point at which I look from the  
4 past to the future.

5 So on balance, the question of nature and  
6 characteristics of the defendant now at this liminal moment  
7 tell me that this is not a jail case. More troubling are the  
8 questions of deterrence that were argued so effectively by  
9 Mr. Moran.

11:47 10 The first is individual deterrence. How can we be  
11 sure that the defendant isn't going to do this or something  
12 like this again? The answer I think is there are conditions in  
13 place because, if he does, then this will be revisited.

14 The more troubling of the deterrent questions is not  
15 specific deterrence of this defendant. There's an interlocking  
16 series of conditions that I think provide for specific  
17 deterrence. It is general deterrence. What does it say to  
18 other people like you who are thinking about, let's see what we  
19 can do in the art market where value is established essentially  
11:48 20 by bidding by people who may know the cost of everything but  
21 not the value of anything. That's difficult. This is an area  
22 in which the potential for fraud is extraordinary. And it is  
23 to the government's credit that they're pursuing these kinds of  
24 cases and not ignoring them or moving past them in some  
25 fashion. That would argue for time, real time.

1 But there's an underlying aspect of this not to be  
2 misunderstood. Increasing amounts of time do not necessarily  
3 mean increasing amounts of deterrence effectively. The most  
4 effective deterrent studies have shown, my experience has  
5 taught me, is swift and certain punishment. And we do not have  
6 a system that provides that. That may be both a glory and a  
7 shortcoming of a due process system. But in any event, that's  
8 the case. We don't have it. The certainty of punishment is  
9 mitigated by the complexity of this undertaking, makes it very  
11:50 10 difficult to uncover. And the amount of work that has been  
11 involved in this, clearly from my review of it, has been  
12 extraordinary on the part of the Bureau, on the part of the  
13 United States Attorney's Office, in peeling the onion that has  
14 been created here by this extraordinary fraud. So it would not  
15 be unreasonable under other circumstances without considering  
16 the other factors to say what we have is time in jail, and  
17 we're going to impose it.

18 But as I've said, I'm dealing with a series of  
19 incommensurables that pull in different directions. I look at  
11:51 20 the question of the value, from a penological perspective, of  
21 time spent in jail. There are programs that are helpful to  
22 some people, but I'd be less than candid if I didn't say that  
23 the principal role of jail is warehousing. There's a reason  
24 for warehousing. Keep people off the street. That's a  
25 utilitarian reason for warehousing.



1           There's a symbolic reason for warehousing. That is to  
2 say you have deprived us, society, of something we're entitled  
3 to, and you're going to pay for it, and the way you're going to  
4 pay for it is in numbers of years or months. That seems out of  
5 focus here for this defendant. Of course I never sentence  
6 someone to jail to give them job training and programs and that  
7 sort of thing, but it's part of the consideration to understand  
8 what jail would mean here.

9           Jail here for me would mean that the defendant has  
11:52 10 failed to take advantage of the opportunity that's provided by  
11 the sentence that I'm imposing and has violated supervision.  
12 He hasn't done that yet, and I'm anticipating he won't. But if  
13 he does, as I keep saying, that's the reason that there's going  
14 to be time.

15           So then I come to the real core of this, what I  
16 sometimes refer to as the fishbone in my throat, which is where  
17 we started to some degree the discussion about restorative  
18 justice, the disparities among demographic groups that mean  
19 that people with privilege or access to funds are able to pull  
11:53 20 together an impressive representation about the things that  
21 they had done in the past and the things they can do in the  
22 future and the programs that they're committed to and they're  
23 turning their life around and are able to turn their life  
24 around and are able to provide the kinds of financing that  
25 makes it easier to do that, including paying for therapists and

1 being able to participate in something called Breakthrough.  
2 And then there are other people who don't have that, other  
3 people who, because they've not had access to funds, don't have  
4 that.

5 Now, the kinds of crimes that are generally committed  
6 among different demographic groups are not always the same, but  
7 they're similar enough that it's important to keep asking the  
8 question and testing a sentence against that question. If this  
9 were someone from a different demographic group, would the  
11:54 10 sentence be the same? It's a question I ask myself here and  
11 it's the most profound question. Not merely because of current  
12 concerns that are energizing the discussion in the general  
13 community but also because it's at the core of what the  
14 sentencing guidelines are supposed to be about.

15 The bargain that was struck by Congress at a time when  
16 Congress still struck bargains was to say that crimes by people  
17 called white-collar defendants were going to be treated as  
18 firmly as crimes committed by people who don't have the benefit  
19 of being able to own a white collar. So I've looked at it from  
11:56 20 that perspective.

21 I believe that this would be the same sentence if I  
22 were dealing with someone from a different demographic group,  
23 having in mind all of the various factors. Certainly that's  
24 the way I test it in this case. People make horrendous  
25 mistakes, and sometimes they're intentional. This was

1 intentional. That means that people are fallible human beings.  
2 That means we all are. Judges, too.

3 That's the historical evaluation. More important is  
4 what happens in the future to the defendant and his role in the  
5 community and his role with his family and his reconstitution  
6 of himself with a deeper understanding of what he's faced.  
7 This sentence is meant to deal with that as well.

8 So for all of those reasons, which I've tried to state  
9 with some greater narrative than might ordinarily be the case  
11:57 10 here so that everybody understands what I've done or why I've  
11 done it and why I've chosen to do it, that's the reason for the  
12 sentence here.

13 Now, because it's complex enough, as I've said, the  
14 actual drafting of this is something that I'm paying attention  
15 to now and I wanted to have this discussion, I've outlined the  
16 basic elements of it that I think will not be departed from  
17 unless I find that something has been missed and I have to call  
18 you back in again to announce the oral dimension of this  
19 sentence. But that's the sentence that's going to be imposed.

11:58 20 I started by saying I'm told that a treasurer's check  
21 has been delivered to the finance office, and of course that  
22 will be reviewed here as part of the defendant's  
23 responsibilities. But in any event, moving back on that  
24 question -- Ms. Beatty?

25 I think we're going to have to take a break now with

1 respect to this while we clarify one aspect of this.

2 (Recess taken 12:00 p.m. - 12:10 p.m.)

3 THE COURT: Well, the short of it is I think we have  
4 to pretermitt this sentencing and frankly reformulate it a bit  
5 as a matter of pretrial release violation, potentially. The  
6 financial department of the clerk's office was contacted just  
7 earlier this morning by the bank that issued the treasurer's  
8 check here saying that certain of the funds that underlie it  
9 appear not to have been -- in the form of checks, not to have  
10 had the funds available.

11 What that means, I don't know, and I think that the  
12 proper way to deal with it is to do several things. First, to  
13 impose as further conditions of pretrial release matters that  
14 we've discussed already. That is, the defendant will be under  
15 home confinement and all of those issues having to do with the  
16 electronic monitoring. So I intend to impose all of those  
17 conditions. You can discuss them as you wish at a later point.  
18 But right now they're in place. That includes, as I've  
19 indicated, the right of the government to pursue deposition.  
12:14 20 That may be something that, after reflection, the defendant  
21 wants to think about and challenge as a condition of pretrial  
22 release, but I'm not going to impose the sentence yet until we  
23 get to the bottom of this issue. So that's the first part.

24 The second part is that this is something that I will  
25 look to the government and the probation office to see whether

1 or not they wish to pursue it as a pretrial release matter.  
2 The finance department here will provide the names of the  
3 people who they had to deal with or who reached out to them,  
4 and they'll go from there. The finance department here, as far  
5 as I'm concerned, is simply the recipient of information from a  
6 third party concerned about having issued a treasurer's check  
7 with insufficient funds in it to support the check. And we'll  
8 see what that generates here.

9 But under these circumstances, I'm certainly not going  
10 forward with the actual sentence in this case. If there is a  
11 pretrial release violation, we'll take it up as a pretrial  
12 release violation on the conditions that existed at the time.  
13 In order to ensure that there's no further problem, we'll use  
14 the new conditions that we've imposed as additional conditions  
15 of pretrial release, including of course home detention. But  
16 I'm not sure that there's much else to say at this point until  
17 we've gotten further information developed here by probation  
18 and by the prosecution here.

19 Mr. Moran, do you have anything that you wanted to --

12:17 20 MR. MORAN: No, Your Honor. I think -- I communicated  
21 with Special Agent Coke who is in the room, and I think she's  
22 prepared to pick up the information. I agree with you, Your  
23 Honor, that there seems to be no reason to involve court staff.  
24 We can pick up the information.

25 THE COURT: To the degree that court staff may be

1 involved, I want to know about it ahead of time. I don't  
2 believe that it's necessary. It's not that I'm protecting  
3 court staff. It's simply that I recognize that they are simply  
4 the recipients of information that they want to pass on, and  
5 they promptly brought it, as you saw, to Ms. Beatty's attention  
6 during the course, right at the end of the hearing here which  
7 is when they were able to get as much information as they  
8 could.

9 MR. MORAN: I agree. And on a separate matter we  
10 made --

11 THE COURT: I'm sorry, I didn't --

12 MR. MORAN: If I may?

13 THE COURT: Yes, please.

14 MR. MORAN: We made representations in our status  
15 report regarding our next efforts. We intend to take those as  
16 a separate track.

17 THE COURT: Right.

18 MR. MORAN: I was conferring with Ms. Head. If we  
19 need to issue subpoenas, I think we should be able to do that,  
12:18 20 but if we need further order from the court, we'll follow up.

21 THE COURT: Yeah. This is now wait until --

22 MR. MORAN: I think Ms. Head informs me, and I tend to  
23 agree, if you enter the preliminary order of forfeiture, that  
24 would assist us if we need to issue some process.

25 THE COURT: It may. And there has not been an

1 opposition to the preliminary order of forfeiture.

2 MS. MINER: No, Your Honor.

3 THE COURT: So I will be entering the preliminary  
4 order of forfeiture. I suspect however that there is some  
5 uncertainty about exactly how broad the subpoena authority is  
6 under that with respect to certain nonparties, and I would  
7 anticipate or at least my focus right now is on the court's  
8 authority to issue subpoenas with respect to violations of  
9 pretrial release, which is a separate grounds for subpoenas to  
10 support whatever effort is undertaken.

11 And while I can't really sort through at this time who  
12 would be the lead investigative agency, there is an  
13 investigative agency, the FBI, that's interested. And I would  
14 assume that they'll take the laboring oar here unless there's  
15 some jurisdictional issue that's created between the marshals  
16 and others here.

17 MR. MORAN: I agree, Your Honor. And should issues  
18 arise, I think we'd be able to work them out. If not, of  
19 course we would let Your Honor know.

12:20 20 THE COURT: What I'm going to do is I'm going to keep  
21 this myself. It won't go to the magistrate now, which would be  
22 the ordinary course for this sort of thing, until we get a  
23 handle on this.

24 MS. MINER: Your Honor, if I just may say one thing.  
25 The intent was obviously, as I said in my arguments two days

1     ago, that he had been collecting all of the money that came in,  
2     and the idea was to give it all to probation for restitution.  
3     I believe the number that was given was given by the bank. In  
4     my experience, one of the reasons we required -- I required a  
5     treasury check was because the bank normally verifies that  
6     there is money before they issue the bank check.

7             THE COURT: Well, whatever the responsibility of the  
8     bank to its stakeholders and its insurer is a problem for the  
9     bank.

12:21 10            MS. MINER: I understand, Your Honor. I just wanted  
11     to tell you how it happened.

12            THE COURT: We have a treasurer's check, presumably  
13     can be negotiated, and the concern is that it will have further  
14     ramifications if it is in this fashion. So we want to try to  
15     deal with this as promptly as possible.

16            MS. MINER: Absolutely. I just wanted to clarify how  
17     the amount was come up with, which was by the bank.

18            THE COURT: I think I understand that. I think it  
19     will become clear to everybody how that was done. The question  
12:21 20     is the underlying activity and the defendant's awareness of any  
21     underlying activity, if that's an issue in this case.

22            So I don't prejudge anything like this, except to note  
23     that it's been brought to my attention and you'll I'm sure  
24     advise the defendant about his various rights and assert them  
25     as you deem necessary in this case. But we're right at the



1 point, as I said, where a lot of thought was given to those  
2 conditions of supervision. They're now conditions of  
3 supervision for pretrial purposes because we hadn't reached  
4 final trial purposes.

5 The check itself which was passed to me I'm going to  
6 pass to Ms. Beatty and she will give it to the finance  
7 department, and then as necessary it can be recovered or copies  
8 can be made or whatever is necessary here just to maintain the  
9 chain of custody with respect to it.

12:22 10 I would only add one further point, which is the  
11 defendant may not now or through his representatives have  
12 contact with the bank. The development of this has to be an  
13 independent investigation until we get a little bit farther.  
14 And if that compromises the defendant's position in the future,  
15 I'll reconsider it. But right now there should be no contact  
16 with the bank by the defendant. Understood?

17 MS. MINER: Yes, Your Honor.

18 THE COURT: That goes for the defendant and any  
19 representative --

12:23 20 MS. MINER: I understand, I get it.

21 THE COURT: Well, yes, but I want to be sure that  
22 nobody's missing the implications of all of this and the record  
23 is clear with respect to it.

24 So we will be in recess on this matter, and when the  
25 parties have something to bring back to me, we'll deal with it.

1 I would hope that we will be able to at least have a  
2 preliminary view about where we're going on this by next week  
3 here, recognizing of course that, as always happens, it's I  
4 think a rule of procedure in the court that things like this  
5 happen on Fridays before long weekends, which makes life more  
6 difficult, but we'll all try to work it through, okay?

7 So the defendant will have to sign conditions of  
8 pretrial release, modified conditions of pretrial release, and  
9 we'll try to get those done promptly. Okay.

12:24 10 MR. MORAN: Thank you, Your Honor.

11 MS. MINER: Thank you, Your Honor.

12 (Adjourned, 12:23 p.m.)

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1 CERTIFICATE OF OFFICIAL REPORTER

2

3 I, Kelly Mortellite, Registered Merit Reporter

4 and Certified Realtime Reporter, in and for the United States

5 District Court for the District of Massachusetts, do hereby

6 certify that the foregoing transcript is a true and correct

7 transcript of the stenographically reported proceedings held in

8 the above-entitled matter to the best of my skill and ability.

9 Dated this 14th day of January, 2023.

10

11 /s/ Kelly Mortellite

12 \_\_\_\_\_

13 Kelly Mortellite, RMR, CRR

14 Official Court Reporter

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